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No. 503

In the Supreme Court of the United States

October Term, 1959.

UNITED STATES OF AMERICA, *Petitioner,*

vs.

GRAND RIVER DAM AUTHORITY, *Respondent.*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES COURT OF CLAIMS.

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In The
Supreme Court of The United States

No. 303

UNITED STATES OF AMERICA, *Petitioner,*

vs.

GRAND RIVER DAM AUTHORITY, *Respondent.*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES COURT OF CLAIMS.

Comes now the respondent, Grand River Dam Authority, and submits the following brief in opposition to the petition for writ of certiorari to review the judgment of the United States Court of Claims entered in the above case on July 15, 1959. (175 Fed. Supp. 153).

Question Presented.

Whether vested water rights and franchise rights in a non-navigable stream acquired under state law can be taken or destroyed by the United States in the exercise of its powers under the Commerce Clause of the Federal Constitution (Art. I, Sec. 8, Clause 3) without compensation.

Statement.

In order to correct the inaccuracies and omissions in the petitioner's statement, we deem it advisable to make this statement.

The Corps of Engineers of the United States Army completed a feasibility study of Grand River in 1932. A report of these studies was published as House Document 308, 74th Congress, First Session (Pl. Ex. 12).

The study and report concluded that there was no federal interest in the development of Grand River for any public purpose, and at page 1261 of the report stated:

> "That there is no present or prospective income to be had from reservoir waters for public or private use other than that to be obtained from construction of power and water supply reservoirs, which should be developed by private capitals."

Following this study and report, the State of Oklahoma, by legislative enactment, created the Grand River Dam Authority, a public corporation, for development of the hydro electric power on Grand River (Session Laws of Oklahoma 1935, Chap. 70, Art. 4, page 350, *et seq.*). Said Act vested in the Authority all of the water power rights in said river, together with the exclusive right and franchise to develop said waters for the production of electric power and energy and other beneficial purposes. (*City of Tulsa v. Grand Hydro, Dist. Court of Mayes County, Okla.* Pl. Ex. 1; *GRDA* v. *Grand Hydro,* 200 Okl. 157, 201 P. 2. 225; *GRDA* v. *Grand Hydro,* 335 U. S. 359 157, 201 P. 2d 225; *GRDA* v. *Grand Hydro,* 335 U. S. 359

The United States did not express any affirmative interest in the development of Grand River until the Flood Control Act of August 18, 1941. (55 Stat. 638-645)

The Authority completed the construction of the Pensacola unit and completed the plans for the Markham Ferry and Fort Gibson units, had acquired lands and rights-of-way and constructed transmission lines to interconnect the three units by 1940 and prior to the 1941 Flood Control Act.

The Authority, prior to said 1941 Flood Control Act, had issued revenue bonds in excess of $11,500,000.00, pledging as security for the payment of these bonds the revenues derived from it properties, including vested water rights and franchise rights in Grand River.

The licenses issued to the Authority for the Pensacola and Markham Ferry projects by the Federal Power Commission retained in the United States no control whatsoever in or over the power pools of these projects. The storage and discharge in the reservoirs above the power pools are under the direction of the Corps of Engineers, all of which was agreed to by the Authority before the licenses were issued.

None of the properties covered in the Authority's claim have been paid for by the United States. The Condemnation case covering the 70 acre tract referred to by petitioner is still pending in the United States District Court for the Northern District of Oklahoma. Certain transmission lines were relocated by agreement between the Authority and the Government; however, none of these properties are included in this lawsuit.

The petitioner refers to the claim that the Authority filed with the Federal Power Commission for headwater improvements. The Federal Power Commission ruled that it had no jurisdiction in the matter, which ruling was sustained by the Court of Appeals. (*GRDA* v. *Federal Power Commission*, 246 F. 2d 453, C. A. 10). However, that decision does not affect any of the matters in this lawsuit.

ARGUMENT.

Writ Should Not Be Granted.

1. *Real Question or Issue.*

The petition for writ of certiorari does not correctly state the question in issue in this cause. The question as stated in said petition is based upon the erroneous assumptions that (1) Oklahoma is a public lands state, (2) the issue of title is to unappropriated waters of the State of Oklahoma, and (3) the State of Oklahoma is claiming compensable interest in the waters of Grand River. All of these assumptions are incorrect and are not substantiated by the record and law in this case.

(a) Indian Territory Not Public Lands.

Grand River, prior to the admission of Oklahoma as a state, was wholly located within the Indian Territory. No lands through which Grand River flowed were public lands.

The Territory of Oklahoma and the Indian Territory were admitted into the Union as the State of Oklahoma on equal footing with the original states. (Proclamation of Statehood, Nov. 16, 1907, No. 6869).

The Territory of Oklahoma, prior to statehood, adherred to the water law known as the "Arid States Doctrine". In the Indian Territory, the common law rule of water law applied.

The Constitution of Oklahoma (Schedule, Sec. 2) placed in force all laws in force in the Territory of Oklahoma at the time of admission of the two territories into

the Union. Therefore, upon statehood, the Arid States Doctrine was placed in force in that part of Oklahoma which was formerly Indian Territory.

Before the Indian Territory was admitted into the Union, the United States had released its right to control the waters of non-navigable streams in the Indian Territory for the development of electric power and energy and other purposes. Section 25 of an Act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and other purposes, April 26, 1906, 34 Stat. 137, provides:

> "That any light or power company doing business within the limits of the Indian Territory * * * are hereby invested and empowered with the right of locating, constructing, owning, operating, using and maintaining canals, reservoirs * * * and a dam, or dams, across any *non-navigable* stream within the limits of said Indian Territory for the purpose of obtaining *a sufficient supply of water* to manufacture and *generate electric power or other power* * * * *provided, that all rights granted hereunder shall be subject to the control of the future territory or state within which the Indian Territory may be situated.*"

Under this Act, when the Indian Territory was admitted as a state, all of the water rights in non-navigable streams were placed under the control of the State of Oklahoma.

(b) No Unappropriated Waters in Grand River.

There were no unappropriated waters in Grand River at the time Congress approved (Flood Control Act of 1941) federal development of Grand River.

Under the Oklahoma Water Code, Chapter 1, Title 82, Oklahoma Statutes, all of the waters of Grand River had been appropriated and all of the water rights in Grand River had been established by a judicial decree. *Tulsa* v. *Grand Hydro, et al., Dist. Court of Mayes County, Oklahoma* (Pl. Ex. 1), which decree held:

> "* * * and the Court further finds and adjudges that the Act creating the Grand River Dam Authority is a legislative appropriation to the Grand River Dam Authority of all of the waters of the Grand River and its tributaries in Oklahoma."

This decree was entered in February, 1938. A certified copy of this decree was of record in the land offices of each county through which Grand River flowed.

(c) State of Oklahoma Is Not Claiming Compensable Interest.

The record in this case conclusively shows that the issue is not whether the State of Oklahoma has a compensable right in the waters of Grand River. The State does not have and does not claim any interest for the reason that it has parted with all of its interest and has conveyed and granted all of its rights in Grand River to the respondent, and the respondent is vested with all water power rights in said stream.

2. *Petition Fails to State Reasons Sufficient for Granting of Writ.*

None of the reasons set out in petition are substantiated by the facts and the law in this case, and do not fall within the rules of this Court (Rule 19).

(a) Waters of Grand River Owned by the State of Oklahoma in Trust.

Oklahoma does not follow the common law doctrine of riparian rights but follows instead the doctrine of prior appropriation for beneficial use, or the so-called "Arid States Doctrine." Under this doctrine, the water running in a natural stream is the property of the state. Oklahoma Code, Title 60, Section 60; Title 82, Section 1, O. S. 1951, *Murphy* v. *Kerr,* 296 Fed. 536 (D. C. N. M. 1923):

> "Water running in a natural stream belongs to the public by a statutory enactment. The States of Arizona, Colorado, California, Montana, Nevada, New Mexico, *Oklahoma,* Oregon, North Dakota, South Dakota, Texas, Utah, Wyoming and Idaho have declared in substance that all waters within the state are the property of the public, or belonging to the state. The modern expression is that such waters are owned by the state in trust for the people * * *. While the corpus of natural water belongs to the state in trust for the public, the law recognizes a property right in its flow and use known as the usufructuary right or the water right. Wile in his works on water rights at page 304, Volume 1, 3rd Edition, gives two definitions of a water right as follows: 'A water right of appropriation is real estate independent of the ditch for carrying the water and independent of the ownership or possession of any land and independent of place of use or mode of enjoyment, whereby the appropriator is granted by the Government the exclusive use of the water anywhere so long as he applies it to any beneficial purpose and it is an incorporeal hereditament, solely usufructuary, not conferring ownership in the corpus of the water and the channel of the stream.
>
> "'A water right is a usufruct in the stream consisting in the right to have the water flow so that some

portion of it (which portion the law limits in various ways) may be reduced to possession and be made the private property of an individual.'

"It is therefore the right to divert water from a natural stream by artificial means and apply the same to beneficial use. Such a right is real estate."

The holding of this Court and the uniform holdings of other courts are that water rights are determined by state law. *Federal Power Commission* v. *Niagara Mohawk Power Corp.*, 347 U. S. 239, at page 252:

"Water rights, like other real property rights, are determined by state law. Title to them is acquired in conformity with the state law."

Also see *Rank* v. *Krug*, 90 Fed. Supp. 773; *Ickes* v. *Fox*, 300 U. S. 82.

The judgment of the Court of Claims is in harmony with these decisions, and not contrary to any decisions of this Court.

(b) Respondent Is Vested With All Water Power Rights and Franchise to Develop the Same.

The respondent is the owner and holder of all of the water power rights and franchise rights to develop the same in Grand River. Session Laws of Oklahoma 1935, Chap. 70, Art. 4, page 350, *et seq.*; *GRDA* v. *Grand Hydro*, 200 Okl. 157, 201 P. 2d 225; 335 U. S. 359 at 363.

The judgment of the Court of Claims is in harmony with these decisions and not contrary to any decisions of this Court.

(c) Vested Water Rights Is Property.

The vested water rights and franchise rights of the respondent is private property. *Ronzio* v. *Denver & R. G.*

W. R. Co., 116 F. 2d 605; *Ickes* v. *Fox*, 300 U. S. 82; *Federal Power Commission* v. *Niagara Mohawk Power Corp.*, 347 U. S. 239; *United States* v. *Appalachian Electric Power Co.*, 107 F. 2d 769.

The judgment of the Court of Claims is in harmony with these decisions and not contrary to any decisions of this Court.

(d) Water Rights Are a Property Interest Which if Taken by the United States Must Be Paid For.

The respondent's *vested* water rights in Grand River a non-navigable stream, are property rights which cannot be taken without just compensation. *International Paper Co.* v. *United States*, 282 U. S. 399; *United States* v. *Kansas City Life Insurance Co.*, 339 U. S. 799; *United States* v. *Cress*, 243 U. S. 316; *Iowa-Wisconsin Bridge Co.* v. *United States*, 114 C. Cls. 464, cert. denied, 339 U. S. 983.

The judgment of the Court of Claims is in harmony with these decisions and not contrary to any decisions of this Court.

(e) Franchise Is Property.

There is no dispute that the respondent holds the exclusive franchise from the State of Oklahoma to develop and generate electric power and energy at the Fort Gibson site. A license, or franchise, is a property right for the taking of which compensation must be paid. *International Paper Co.* v. *United States, supra; Frost* v. *Corporation Commission*, 278 U. S. 515; *Jackson* v. *United States*, 122 C. Cls. 197; *United States* v. *Smoot Sand & Gravel Co., Inc.*, 248 F. 2d 822.

The judgment of the Court of Claims is in harmony with these decisions and not contrary to any decisions of this Court.

Summary.

The undisputed facts and law in this case are:

1. That, under state and federal law, the State of Oklahoma has the power and right to control the non-navigable waters in the State of Oklahoma.
2. That the State of Oklahoma has the right to grant, convey and vest in others the exclusive right to make beneficial use of waters in non-navigable streams in Oklahoma.
3. That the State of Oklahoma vested in the respondent, Grand River Dam Authority, the exclusive right to develop the waters of Grand River for the production of electric power and energy.
4. That long before the taking by the Government, the respondent had made beneficial use of the waters of Grand River and had incurred bond obligations pledging the revenues from its properties, including these water rights, for the payment of said obligations.
5. That the construction of the Fort Gibson project by the United States took and destroyed the Authority's exclusive water power right and franchise right to develop electric power and energy from Grand River at the Fort Gibson site.

It cannot be doubted that Congress had the power to take over the development of Grand River for flood control and the production of electric power and energy in aid of navigation and supersede this plaintiff, but only subject to the limitations imposed by the Fifth Amendment of the Constitution by paying just compensation for property and *vested* property rights taken and destroyed in this non-navigable stream.

Under the petitioner's theory in this case, the Federal Government can take or destroy *vested* water rights and other property rights in the most remote rivulet and mountain stream without paying just compensation. It is common knowledge that (with a very few isolated exceptions) all rivulets, creeks and streams in the seventeen "arid states" (Oklahoma included) connect somewhere in their course to the ocean with a stream that is navigable.

If the petitioner's contention is correct, then the Federal Government can take or destroy every vested water right that is essential to sustain not only the life of most of our population but every vested water right that is vital to agriculture and industry without compensation. This would mean that the Federal Government could take and destroy water rights of great cities such as Oklahoma City, Tulsa and Muskogee, without paying just compensation. The cities named obtained their water rights under the Oklahoma Water Code, the same as this respondent.

We do not believe that it was ever the intention of the framers of our Constitution that our Government, under the Commerce Clause of the Constitution, could go out to

every rivulet, creek and stream and take away vested water rights without paying for them; neither do we believe that it was the intention of the Congress, by the enactment of flood control legislation, to authorize the Federal Government to take away or destroy vested water rights, and other property, in non-navigable streams without paying for them. In fact, history refutes the petitioner's contention, and it appears that it has been the intention of Congress to protect such vested water rights, particularly in the seventeen states lying west of the 97th meridian (Oklahoma being one of these states). This is best shown by reference to a few of such Acts. Section 25 of the Act of April 26, 1906, 34 Stat. 137, *supra;* Section 8 of the Reclamation Law of June 17, 1902 (43 U. S. C. A. 383); Section 27 of the Federal Power Act (16 U. S. C. A. 821); Flood Control Act of December 22, 1944, as amended July 26, 1947 (33 U. S. C. A. 701-1).

Conclusion.

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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